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"Take Back the Beach!" An Analysis of the Need for Enforcement of Beach Access Rights for U.S. Virgin Islanders

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“TAKE BACK THE BEACH!”

AN ANALYSIS OF THE NEED FOR ENFORCEMENT OF BEACH ACCESS RIGHTS FOR U.S. VIRGIN ISLANDERS

Aliya T. Felix^A

INTRODUCTION	419
I. TRADITIONAL USE OF BEACHES IN THE U.S. VIRGIN ISLANDS	423
II. LEGAL FRAMEWORK OF PUBLIC RIGHTS OF ACCESS	424
A. <i>V.I. Open Shorelines Act</i>	425
B. <i>V.I. Investment Incentive Act</i>	426
C. <i>Case Studies of Past Litigation</i>	427
III. PROBLEMS EXERCISING BEACH ACCESS RIGHTS	429
IV. PROPOSAL FOR REFORM	433
A. <i>Amend the Current Law</i>	434
1. Express Requirement of Access to Shoreline	434
2. Enable Coastal Zone Management to Ensure Proactive Enforcement	436
3. Establish Penalties for Violation	438
B. <i>Land Use Mechanisms</i>	440
1. Creation of Beach Parks	440
2. Historical Usage Easements	442
3. Exactions	445
4. Government-Managed Leasing Program	446
CONCLUSION	448

INTRODUCTION

The U.S. Virgin Islands:¹ I call it home; you call it “America’s Paradise.” One of the trademarks of the U.S. Virgin Islands is its beau-

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1. Fearing a German seizure that would have given U-boats a base in the Caribbean during World War I, the U.S. purchased the then “Danish Virgins” for \$25,000,000 in gold coins and renamed them the Virgin Islands of the United States. *See Purchase of the United States Virgin Islands 1917*, U.S. DEP’T OF STATE, <http://2001-2009.state.gov/r/pa/ho/time/wwi/107293.htm> (last visited June 16, 2015). This group of islands includes St. Thomas, St.

tiful beaches. One of the luxuries of being born and raised in the beautiful U.S. Virgin Islands is having access to some of the world's most beautiful beaches every single day. Imagine being able to go to a place where the sand is white, soft, and just caresses your feet, while the trees shade you as you lounge. The crystal sparkling water is pristine and marine life is visible as you bathe. Thousands flock each year to feel gentle breezes and experience the sandy shores of this tropical paradise.²

These are the attributes that draw throngs of tourists each year and what locals cherish and appreciate.³ "There is probably no custom more universal, more natural or more ancient . . . than that of bathing in the salt waters of the ocean," and enjoying the warm sands.⁴ For years, tourists, together with the people of the U.S. Virgin Islands, have enjoyed this splendor each year, all year long. As a little girl, and now as an adult, one of the most popular past times I cherish is enjoying the beach. As a native Virgin Islander, I realize and treasure the role that our beaches play in our lives and would love to see my children and their children come to feel that same love as they grow. Our islands are really special; they are our pride and joy.

Unfortunately, the ability to enjoy the beaches faces complications from private landowners⁵ who have blocked or restricted beach access.⁶ In the U.S. Virgin Islands, beaches have been transformed from fishing boat landings and morning and evening bathing sites to exclusive retreats for condominium owners and hotel guests.⁷ Being somebody else's playground changed the Caribbean's fishermen into beach boys and its farmers into waiters.⁸ As the coastlines were built

John, St. Croix, and Water Island. It also consists of about one hundred small isles and inlets. HAROLD W.L. WILLOCKS, GEOGRAPHY OF THE VIRGIN ISLANDS OF THE UNITED STATES 54 (2005) [hereinafter WILLOCKS, GEOGRAPHY].

2. Telephone Interview with Harold W.L. Willocks, Historian/Author, THE UMBILICAL CORD: THE HISTORY OF THE UNITED STATES VIRGIN ISLANDS FROM PRE-COLUMBIAN ERA TO THE PRESENT (Feb. 8, 2014) [hereinafter Willocks Interview].

3. *Id.*

4. City of Daytona Beach v. Tona-Rama, Inc., 294 So. 2d 73, 75 (Fla. 1974).

5. Private "littoral" owners restrict public use of the upland or dry-sand area. Recreation depends on this part of the beach. Without it, the public is only left with wet-sand. Steve A. McKeon, Note, *Public Access to Beaches*, 22 STAN. L. REV. 564, 565-66 (1970). "Historically, these rights were called littoral rights if the land abutted the seashore, and riparian rights if the land abutted rivers and coastal waters. Today, the distinction is disappearing and being replaced with the generic term 'riparian.'" ALISON RIESER ET AL., OCEAN AND COASTAL LAW 126 (2013).

6. Issues regarding the "seaward access" to the beaches and shorelines are beyond the scope of this paper.

7. Willocks Interview, *supra* note 2.

8. *Id.*

up and became more crowded, more and more beaches were being closed off.⁹ This closing off of beaches to the general public led to a national beach access movement,¹⁰ which tried to protect and expand the public's ability to gain physical access to the shoreline.¹¹

Defense of the public's access to the beaches is protected and expanded by the public trust doctrine, which embodies the principle that certain natural and cultural resources are preserved for public use, and that the government owns and is required to protect and maintain these resources for the public's reasonable use.¹² It has its genesis in the ancient laws of the Roman Emperor Justinian of Constantinople (527 A.D. - 565 A.D.),¹³ later became English law under the Magna Carta (1215 A.D.),¹⁴ and subsequently became a settled part of the common law of the United States,¹⁵ as evidenced in the case of *Illinois Central Railroad Company v. Illinois*.¹⁶ In that case, the Court held that the common law public trust doctrine prevented the government from alienating the public right to the lands under navigable waters, with the exception of very small portions of land that have no affect on free access or navigation.¹⁷ The doctrine applies to navigable waters and waters influenced by tides, as well as to the natural resources existing on the land and water of public trust property.¹⁸ While laws upholding the public trust doctrine vary among jurisdictions within the United States, they generally limit the rights of waterfront

9. *Id.*

10. HAROLD W.L. WILLOCKS, *THE UMBILICAL CORD: THE HISTORY OF THE UNITED STATES VIRGIN ISLANDS FROM PRE-COLUMBIAN ERA TO THE PRESENT* 385-86 (1995) [hereinafter WILLOCKS, *THE UMBILICAL CORD*]. "The free beach movement in the Virgin Islands began in 1971 on St. Thomas. The Citizens' Committee for Beaches for All obtained 2,500 signatures on a petition to the Governor and the Legislature to make all sandy beaches and the entire shoreline the property of all the people of the Virgin Islands. They held protests, marches, and swim-ins on closed beaches. As a result of demonstrations by these groups and others and a public demand for unrestrained access to all beaches, the Legislature passed the Open Shorelines Act." *Id.*

11. Willocks Interview, *supra* note 2.

12. Joseph L. Sax, Comment, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

13. *Id.*

14. *Id.* at 475-76.

15. The history of the public trust doctrine in America is recounted at length in *Shively v. Bowlby*, 152 U.S. 1 (1894).

16. *Ill. Cent. R. R. Co. v. State of Ill.*, 146 U.S. 387 (1892). Here, the Court revoked a grant by the Legislature of the State of Illinois of a large portion of the Chicago harbor to the Illinois Central Railroad Company.

17. *Id.*

18. *Id.*

private property owners and allow for the public's right to recreational use and navigation thereon.¹⁹

The U.S. Virgin Islands upholds the principles of the public trust doctrine through the Open Shorelines Act.²⁰ This law specifically prohibits inhibiting access to what is defined in the act as the shoreline.²¹ However, hotels and condominiums are placing a high burden on the people of the U.S. Virgin Islands to access beaches so that they can preserve exclusivity to their guests and residents.²² They are getting craftier and, in some cases, they are finding indirect ways of limiting access and are getting away with it in many of those cases. Some people do not know any better and do not fight for the right of access to be preserved, others who know better are not upholding the laws, and those who are ready to fight feel as though they do not have the power to make a difference because those who can make a change sit back and allow the injustice to occur.²³

Part I of this paper defines the traditional use of the beaches in the U.S. Virgin Islands and includes a personal anecdote as evidence of a trend toward restricting beach access in the U.S. Virgin Islands. Part II provides a legal framework of public beach access rights through an analysis of the general public trust doctrine, the U.S. Virgin Islands Open Shorelines Act, and the U.S. Virgin Islands' case law. Part III examines case studies involving private entities blocking beach access to the public in the U.S. Virgin Islands. Part IV offers a proposal for reform to ensure protection of the public's right of access to the beautiful beaches of the U.S. Virgin Islands. The reform first proposes clarification of the laws and their enforcement through Coastal Zone Management (CZM),²⁴ and assessment of penalties for violations of those laws. Utilizing uplands in various forms is a second avenue that this paper proposes the government take in ensuring that the people's rights are preserved. By regulating the uplands contiguous to the shorelines, the government can also ensure the people's access to, and utilization of, the beaches through tax exemption and other investment incentive programs, which contractually obligate the upland beneficiaries to provide, preserve, and defend the people's rights.²⁵ It is time

19. *Id.*

20. V.I. CODE ANN. tit. 12 §§ 401-404 (2012).

21. § 402.

22. Telephone Interview with Camara M. Merchant, Public Relations Coordinator, Ritz Carlton St. Thomas (Feb. 8, 2014).

23. Telephone Interview with Verne Hodge, Chief Judge Emeritus (retired), V.I. Superior Court (Feb. 12, 2014).

24. V.I. CODE ANN. tit. 12 § 903 (2012).

25. V.I. CODE ANN. tit. 29 § 708(i) (2012).

to take back our beaches for the people of the U.S. Virgin Islands and future generations.

I. TRADITIONAL USE OF BEACHES IN THE U.S. VIRGIN ISLANDS

“The sea has long dominated the history of the U.S. Virgin Islands”²⁶ and served as a gateway for each of the seven flags²⁷ that have reigned over these islands.²⁸ The shoreline, where the sea meets the land, is the threshold to the sea.²⁹ Since the U.S. Virgin Islands is made up of islands and cays, all of which are surrounded by water, each island or cay has shorelines.³⁰ All residents and visitors have, in the past, used the shorelines of the U.S. Virgin Islands freely.³¹ It is a longstanding tradition in the U.S. Virgin Islands that the beaches are used for access to the sea.³² As early as 2000 B.C., there is evidence of dependency on the shore by the people who inhabited these islands.³³ Beaches are a vital part of the U.S. Virgin Islands, providing the people with aesthetic beauty, economics, meditation, recreation, a natural resource, and a cultural custom.³⁴ They also provide a buffer against high winds and waves during storms or turbulent seas.³⁵ To fishermen, the sea and its shores are a way of life.³⁶ As one of the territory’s biggest economic generators, tourism is critically important to the U.S. Virgin Islands.³⁷ Tourists flock to the U.S. Virgin Islands in droves each year.³⁸ Some of the most popular tourist attractions are the white sands and crystal clear, blue beaches.³⁹ The second half of the twentieth century has brought adverse changes to the U.S. Virgin Islands’ shorelines.⁴⁰ There has been uncontrolled and uncoordinated develop-

26. § 401.

27. The U.S. Virgin Islands has been owned in part by England, Spain, France, Knights of Malta, Holland, Denmark, and now the U.S. WILLOCKS, *THE UMBILICAL CORD*, *supra* note 10, at 3.

28. V.I. CODE ANN. tit. 12 § 401 (2012).

29. WILLOCKS, *GEOGRAPHY*, *supra* note 1.

30. *Id.*

31. Willocks Interview, *supra* note 2.

32. *Id.*

33. WILLOCKS, *THE UMBILICAL CORD*, *supra* note 10, at 27.

34. Willocks Interview, *supra* note 2.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. V.I. CODE ANN. tit. 12 § 401 (2012).

ment of this area, together with attempts, some successful, to curtail the use of these areas by the public.⁴¹

With this economic development of the shorelines, obstructions to the public's access and use of the beaches has become more and more objectionable as upland owners and businessmen attempt to maximize their profits by excluding "free beach locals" to give privacy to their paying tourists.⁴² This compelled the U.S. Virgin Islands' Legislature to enact the "declaration for policy" in its Open Shorelines Act in 1971 and create an "Open Beaches Committee."⁴³

Growing up in the U.S. Virgin Islands, Vessup Beach is a beautiful beach on St. Thomas that I frequented as a little girl. During the summer of 2013, I visited home. My daughter's second birthday was fast approaching and I decided to throw her a beach party there. I was a little apprehensive because I heard of a hotel blocking access to that beach. I discovered that access to that particular beach, as I knew it, no longer existed. The hotel's poolside and lots of shrubbery blocked access to the beach. I decided to try to gain access and walked through the private entity's property; however, I was stopped and told that access was only granted to guests of the hotel and that since I was not a guest, I was trespassing and had to leave the premises. I was shocked, but I left peacefully. I knew in my heart that it was wrong for a hotel to deny me access to a beach, especially one frequented by the public for so long, but I left and did nothing. Little did I know, I actually had a legal right to take action.

II. LEGAL FRAMEWORK OF PUBLIC RIGHTS OF ACCESS

The land located above the mean high-tide line, or dry sand, is often privately owned.⁴⁴ A state generally holds legal title to the land seaward of the mean high-tide line in trust for the public.⁴⁵ As a result of this "trust", the public has a right to use these lands and waters, subject to reasonable limitations.⁴⁶ Historically, this doctrine traces back to Roman and English common law, with the principle being that the sea belongs to no one, and that use is common to all.⁴⁷ Not surprisingly though, the extent of the public's rights of access to the intertidal

41. *Id.*

42. Hodge, *supra* note 23.

43. V.I. CODE ANN. tit. 12 § 401 (2012). This act will be discussed further in Part II.A.

44. RIESER ET AL., *supra* note 5, at 125.

45. *Id.*

46. *Id.*

47. *Id.* at 127.

zone has been the subject of litigation in many states, producing diverse results.⁴⁸ The scope of the public's right to use this specific land also varies significantly among the coastal states.⁴⁹ Courts have "consistently acknowledged that the public trust rights in the intertidal land adapted to reflect the realities of use in each era."⁵⁰ "[T]he common law gives expression to the changing customs and sentiments of the people,⁵¹ and its genius is the 'flexibility and capacity for growth and adaptation.'⁵² The V.I. Legislature and courts have both recognized the importance of this right of access to the beaches of the U.S. Virgin Islands through the Open Shorelines Act of 1971,⁵³ the Investment Incentive Act of 1972, and judicially established case law.⁵⁴

As indicated above, the principles of the public trust doctrine were long engrained in the people of the U.S. Virgin Islands, and any distinctions between the "shoreline" and the "beaches" are merely illusory. Since beaches have always been a part of the shoreline, traditional uses have also included the use of the beaches by the public.⁵⁵ Thus, as will be explained below, the V.I. Open Shorelines Act, as well as the V.I. Incentive Act, encompass not only the well-known shoreline uses, but also the access to and use of the beaches.

A. *V.I. Open Shorelines Act*

The Legislature of the U.S. Virgin Islands found that there has been uncontrolled and uncoordinated development of the shorelines together with attempts to curtail the use of those areas by the public.⁵⁶ Accordingly, the legislature declared, as a matter of policy, that the right of the public to frequent, uninterrupted, unobstructed use of the shorelines must be preserved.⁵⁷ The Open Shorelines Act of the U.S. Virgin Islands provides that

[n]o person, firm, corporation, association or other legal entity shall create, erect, maintain, or construct any obstruction, barrier, or restraint of any nature whatsoever upon, across or within the

48. *See id.* at 128.

49. *Id.*

50. *McGarvey v. Whittredge*, 28 A.3d 620, 631 (Me. 2011).

51. *Id.* at 635 (quoting *State v. Bradbury*, 9 A.2d 657, 658 (Me. 1939)).

52. *Id.* (quoting *Pendexter v. Pendexter*, 363 A.2d 743, 749 (Me. 1976) (Dufresne, C.J., concurring)).

53. V.I. CODE ANN. tit. 12 § 903 (2012).

54. *Hodge*, *supra* note 23.

55. All beaches are shorelines, but not all shorelines are beaches.

56. V.I. CODE ANN. tit. 12 § 903 (2012).

57. *Id.*

shorelines of the United States Virgin Islands as defined in this section, which would interfere with the right of the public individually and collectively, to use and enjoy any shoreline.⁵⁸

The act defines the shorelines of the U.S. Virgin Islands as meaning

the area along the coastlines of the United States Virgin Islands from the seaward line of low tide, running inland a distance of fifty feet; or to the extreme seaward boundary of natural vegetation which spreads continuously inland; or to a natural barrier; whichever is the shortest distance. Whenever the shore is extended into the sea by filling or dredging, the boundary of the shorelines shall remain at the line of vegetation as previously established.⁵⁹

This policy demonstrates that, since the public has made frequent, uninterrupted, and unobstructed use of the shorelines and beaches throughout Danish and American rule, it intends to preserve that tradition and protect what has become a right of the public.⁶⁰ Indeed, the constitutionality of that enactment was upheld in *Rivera v. U.S.*⁶¹

B. V.I. Investment Incentive Act

While struggling to develop its economy, the V.I. Legislature provides various incentives to attract businesses to its shores, particularly rum production, oil refinery, and tourism.⁶² To this end, the Legislature declared as policy that certain investment benefits would be made available through business activities, provided that the public interest was not adversely affected.⁶³ Thus, legislative provisions had to be enacted in order to advance the economic and social development of the islands, while at the same time protecting the traditional rights of the people.⁶⁴ The Investment Incentive Act of the U.S. Virgin Islands provides:

For any applicant who proposes to do business on land adjoining any beach or shoreline of the Virgin Islands, agree to grant to the government of the Virgin Islands a perpetual easement upon and across such land to the beach or shoreline to provide free and unrestricted access thereto to the public, which easement shall be duly

58. § 403.

59. § 402.

60. *Id.*

61. *Rivera v. United States*, 33 V.I. 234 (D.V.I. 1996).

62. § 701.

63. *Id.*

64. *Id.*

recorded in the Recorder of Deeds upon the designation of the business as an Enterprise Zone Business.⁶⁵

C. Case Studies of Past Litigation

There are cases in the U.S. Virgin Islands that document the fight between the public right of access to the beaches and private property owners blocking that access. These cases support the notion that the government recognizes the importance of public beach access. *United States v. St. Thomas Beach Resorts* involved the Bolongo Bay Beach and Tennis Club, which borders the Caribbean Sea.⁶⁶ The club constructed two fences that were each nine feet high.⁶⁷ Each fence ran the length of the beach area adjoining the Club's property and extended into the ocean for "approximately 50 and 30 feet at the eastern and western extremities, respectively, of the Bolongo Bay Beach and Tennis Club."⁶⁸

The plaintiffs in this case were the governments of the U.S. and the U.S. Virgin Islands.⁶⁹ Their argument was that the parts of the fences "seaward of the mean high-tide mark [were] trespasses [on] United States [property], and that the inland extension of the fences . . . obstruct the Virgin Islands shoreline, in violation of the Virgin Islands Open Shorelines Act"⁷⁰ The plaintiffs demanded the "removal of the fences and that [the] defendant be permanently enjoined from maintaining any fences or 'other obstruction[s] upon the property of the United States; or any obstruction interfering with the right of the public, individually and collectively to use and enjoy the shoreline of the Virgin Islands.'"⁷¹ The court stated that in the U.S. Virgin Islands, submerged lands up to the mean high-water mark are property of the United States of America.⁷² The court held that the fences were both a trespass on U.S. land and a violation of the V.I. Open Shorelines Act.⁷³

The court discussed the right of the public to use the beach and how that right was "established by firmly, well settled, long standing

65. § 1011(1)(h).

66. *United States v. St. Thomas Beach Resorts*, 386 F. Supp. 769, 770 (1974).

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 771.

72. *St. Thomas Beach Resorts*, 11 V.I. at 771.

73. *Id.*

custom.”⁷⁴ To the extent that beachfront property is concerned, the court stated that the Open Shorelines Act codifies this right.⁷⁵ The court also relied on the plaintiffs’ affidavits that proved that the public used the beach “on a regular and continuing basis for swimming and recreation, without permission from, or need of permission of the upland owners, at least from 1923 through March, 1974.”⁷⁶ There was even an affidavit from a prior owner of the property⁷⁷ revealing that during the prior owner’s ownership

the beach was “always . . . open for the use of the public for . . . recreational purposes”, that she never interfered with the public use of the beach, and that the public never asked her permission to use the beach, “but simply used it as if it were a public beach.”⁷⁸

Although a victory for beach access rights, this trend should be the norm for the administrative agency in charge of beach access on its own, and not need to have the U.S. Government involved as an enforcer for the complainants.

Another case showing the strong public access roots in the courts involved a “partial shutdown of the federal government due to ongoing budget-related problems and the temporary closing of Buck Island to the public.”⁷⁹ Buck Island, off the coast of St. Croix, became part of the National Park System under proclamation by President John F. Kennedy, and is thus federally controlled.⁸⁰ National Park Service employees informed the plaintiffs that, because of the partial shutdown, the beach was closed and they could not use the beach at Buck Island.⁸¹ Plaintiffs argued that closing the beach violated the Open Shorelines Act, as well as the “express language of the presidential proclamation [which] prohibited the closing of the beach at Buck Island.”⁸² Therefore, plaintiffs sought injunctive relief.⁸³ The defendant maintained that closing the beach was within its authority because federal regulations permit limitations on public access.⁸⁴

The court held that “[a] requirement that Buck Island be closed to the public due to a federal budget crisis directly contravenes the ex-

74. *Id.* at 772.

75. *Id.*

76. *Id.*

77. *Id.*

78. *St. Thomas Beach Resorts*, 11 V.I. at 772 (citing Affidavit of Winia M. Giroux).

79. *Rivera*, 910 F. Supp. at 240.

80. *Id.* at 239-40.

81. *Id.* at 240.

82. *Id.*

83. *Id.*

84. *Id.* at 241.

press directive⁸⁵ that the federal government not interfere with the bathing and recreational activities at Buck Island.”⁸⁶ The court also held that an injunction was the only means of redress.⁸⁷ Although these favorable decisions uphold the Open Shorelines Act of the U.S. Virgin Islands, problems still exist that involve violations of this Act. Other than the few cases like *Rivera* and *St. Thomas Beach Resorts*, offended members of the public seldom seek administrative or judicial enforcement of their free beach and open shoreline rights.⁸⁸ Thus, rights once enjoyed by the public without interruption are now under attack by private property owners and businessmen with almost total impunity.⁸⁹

III. PROBLEMS EXERCISING BEACH ACCESS RIGHTS

Although U.S. Virgin Islanders enjoy public trust rights to beaches, access to those beaches is still often restricted. Private entities in the U.S. Virgin Islands, specifically private hotels and large residential entities that are beachfront owners, have facilitated the trampling of the people’s right to public beach access by the government, because the law is flawed.

Historically, these entities argued that blocked access was in the best interest of tourism, which is a major contributor to the local economy.⁹⁰ They claimed that tourists came to these islands to enjoy our beaches away from public intrusion and that keeping beaches public would be inviting crime upon the tourists and the homes built around the coast.⁹¹ Many St. Thomians were passive actors in terms of development until the latter 1970s.⁹² Most people earned an income, but “[t]hose who owned land and controlled the political system built their exclusive subdivisions, created tourist enclaves, and paved their island.”⁹³ This resulted in the public finding fewer beaches for social-

85. *Rivera*, 918 F. Supp. at 242.

86. *Id.*

87. *Id.* at 243.

88. Hodge, *supra* note 23.

89. *Id.*

90. WILLOCKS, *THE UMBILICAL CORD*, *supra* note 10, at 385.

91. *Id.*

92. Barbara R. Johnston, “Save Our Beach Dem and Our Land Too!” *The Problems of Tourism in ‘America’s Paradise’*, CULTURAL SURVIVAL QUARTERLY, <http://www.cultural-survival.org/publications/cultural-survival-quarterly/united-states/save-our-beach-dem-and-our-land-too-problems-> (last visited June 20, 2015).

93. *Id.*

izing, bathing, or landing their fishing boats.⁹⁴ The Open Shorelines Act cemented a right of public use of the coastal zone. However, access to that zone, to this day, is still not effectively enforced.⁹⁵

St. Thomians are no longer passive in the development decision-making process. “The final straw [was] when the . . . government approved zoning changes that [allowed] construction of a [large-scale] resort adjacent to Magens Bay [Beach]”⁹⁶ This rezoning by the Senate occurred without formal application, planning office input, public hearings,⁹⁷ or “comment or discussion on the Senate floor.”⁹⁸ Three weeks after the public became aware of the zoning change, voters braved Hurricane Klaus to remove all senators who approved the rezoning.⁹⁹ The rezoning was fairly quickly repealed, however, and the developer filed a formal application that was approved by the planning commissioner (against his staff’s recommendation).¹⁰⁰ It was not until two years later—a day before the hearing proposal on the issue—that nine of the fifteen senators in the legislature voiced their lack of support for the development.¹⁰¹

This incident illustrates how the legislature has been forced to acknowledge that the public means business and that beach access is a serious matter of concern. This was an issue in the past, and the legislature should remain alert for similar instances in the future. It also established that private entities cannot and will not run these islands by trampling the rights of the people. Although U.S. Virgin Islanders have been granted these rights and have proven to the legislature that beach access is a necessity, there is a current epidemic concerning blocked beach access.

On January 9, 2014, the Sapphire Beach Resort erected barricades that eliminated the parking area used by beach-goers.¹⁰² For years, beach-going locals and visitors used this parking area.¹⁰³ The

94. *Id.*

95. *Id.*

96. *Id.*

97. Political contributions influenced the legislature here. The official name of the property—“Zeugfriedenhoy”—was used so as to disguise from the public what they knew to be Magens Bay Beach. *Id.*

98. Johnston, *supra* note 92.

99. *Id.*

100. *Id.*

101. *Id.*

102. Aldeth Lewin, *New Sapphire Owner Blocks Beach Parking*, THE VIRGIN ISLANDS DAILY NEWS (Jan. 10, 2014), <http://virginislandsdailynews.com/news/new-sapphire-owner-blocks-beach-parking-1.1614502>.

103. *Id.*

Resort's CZM permit is conditioned on open beach access.¹⁰⁴ The question in this pending case is likely to be whether restricting parking amounts to restricting access to the beach in violation of the permit. Although the new owner may try to argue that the purpose of the restriction is to protect his property, it appears to be yet another attempt by private resorts to restrict public access to the beaches. Reducing or eliminating parking altogether creates a restriction for the public of reasonable access that will likely deter attempts to access the beach at all and should be held as a violation of the Resort's permit and the Open Shorelines Act.¹⁰⁵

This case exemplifies the flaws in the Open Shorelines Act. There is a sense of uncertainty when access issues arise. Who does the public turn to and what can they do? What constitutes blocking access? These are the questions that seem to be in the mind of the public that go unanswered.

Another ongoing beach access issue on the island of St. Croix involves Easter campers.¹⁰⁶ During Easter, it is a local tradition for people to camp out on the beaches.¹⁰⁷ One such beach that is often visited by Easter campers is Salt River Columbus Landing.¹⁰⁸ Some families have been camping there for about fifty years.¹⁰⁹ However, there is growing uncertainty as to whether the campsite will remain open and/or accessible.¹¹⁰

In 2010, a Texas couple bought adjoining beachfront property, began building, and placed boulders on the dirt access road that ran parallel to the beach on their property.¹¹¹ The change displaced the campers and each campsite had to be set up further down the beach than in previous seasons.¹¹² Fewer campsites became available and, as a result, some campers were displaced altogether.¹¹³ Consequently, some campers try setting up as early as April 1st to ensure their

104. *Id.*

105. See Jennifer A. Sullivan, *Laying out an "Unwelcome Mat" to Public Beach Access*, 18 J. LAND USE & ENVT'L. L. 331, 352-53 (2003).

106. Daniel Shea, *Easter Campers Fear Their Beach Access is Dwindling*, THE VIRGIN ISLANDS DAILY NEWS (Apr. 22, 2011), <http://virginislandsdailynews.com/news/easter-campers-fear-their-beach-access-is-dwindling-1.1135969>.

107. See *id.*

108. *Id.*

109. Willocks Interview, *supra* note 2.

110. Shea, *supra* note 106.

111. *Id.*

112. See *id.*

113. *Id.*

spot.¹¹⁴ Blocking the access road also creates limited vehicle access.¹¹⁵ Campers often carry heavy equipment, including stoves and refrigerators, and are forced to find a new beach or stop camping altogether.¹¹⁶ Regarding this matter, the Assistant Director of CZM stated: “[W]hile we can make public beach access a requirement of a major CZM permit, we cannot make a private residential homeowner grant access to a shoreline.”¹¹⁷ This case displays the lack of enforcement power of CZM as well as what seems to be a lack of guidance for CZM to follow in terms of beach access and what they can and cannot do under the Open Shorelines Act.

Another contentious debate is occurring in the Judith Fancy community, where locals were told to present driver’s licenses before access would be granted to the beach.¹¹⁸ The homeowners association recently implemented this policy.¹¹⁹ Locals argue that the road leading in to the area should not be subject to “any type of restricted access by the association.”¹²⁰ On the other hand, the association argues that the road is private property and, as such, can be protected through the current measures, “especially in light of recent increase in burglaries.”¹²¹ Police Lieutenant Joseph Platt advised that “no one other than a police officer is authorized to request a driver’s license from any motorist and that motorists should not surrender their license to anyone other than an officer or the court.”¹²² As to accessing the beach, the CZM Office stated that it could only regulate what the V.I. Code covers and that “the code does not address the manner of gaining access.”¹²³ Essentially, there is nothing the CZM Office can do and the matter should be addressed with the legislature to amend the law. To date, nothing has been done to completely resolve this issue and those involved still claim to be gathering information to find a solution.¹²⁴

This demonstrates how the Open Shorelines Act lacks specific provisions regarding the manner of enforcing access to the beaches

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. Fiona Stokes, *Tempers Flare at Contentious Meeting over Beach Access at Judith’s Fancy*, THE VIRGIN ISLANDS DAILY NEWS (Oct. 3, 2012), <http://virginislandsdailynews.com/news/tempers-flare-at-contentious-meeting-over-beach-access-at-judith-s-fancy-1.1382486>.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

held in public trust. It also shows CZM's frustration in trying to achieve its goals. CZM was created to ensure that the public has the continuous right to use and enjoy the shorelines and to maximize public access to and along the shorelines.¹²⁵ However, because of the state of the law, CZM feels powerless to enforce that purpose.

In February of 2014, the Virgin Islands Daily News reported another incident of beach access restraint, proving that beach access issues are still very much alive and well.¹²⁶ A local resident took his family to the Buccaneer Hotel to go to the beach, as he has been doing for years, but a security guard told the family to turn around and leave.¹²⁷ When the resident questioned the security guard, there was no explanation as to why the family was denied access to the beach.¹²⁸ The manager who responded to the incident said that their general policy is to close the beach to locals when it is busy with tourists and that locals may return when there is less business.¹²⁹

In addition to all of these unresolved matters, there are other issues with limited access to beaches fenced in at Sandy Point, the Buccaneer Hotel, Carambola, Enfield Green, and other areas that need to be addressed.¹³⁰ All of these cases show a multitude of issues that must be resolved by the Legislature of the U.S. Virgin Islands, including how widespread and pressing this issue is in the territory, as well as the lack of government support in addressing the issues. The people of the U.S. Virgin Islands are more than willing to share access to the beaches; however, they will no longer tolerate tourists, hotels, or condominiums blocking access for their own private uses.¹³¹

IV. PROPOSAL FOR REFORM

Heightened emotions of the public, the lack of legislative backing, and the persistent purpose to obstruct public access from large private landowners makes beach access reform more necessary than ever in the U.S. Virgin Islands. Comprehensive public access legislation, coastal management regulations, and vigorous enforcement are

125. V.I. CODE ANN. tit. 12 § 903 (2012).

126. Joy Blackburn, *Crucian Complains Hotel is Turning Away Locals*, THE VIRGIN ISLANDS DAILY NEWS (Feb. 26, 2014), <http://virginislandsdailynews.com/news/crucian-complains-hotel-is-turning-away-locals-1.1641146>.

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. WILLOCKS, THE UMBILICAL CORD, *supra* note 10, at 386.

needed to address these problems and increase access.¹³² The present system of regulatory controls does not adequately protect rights to access the beaches and the shores.

This part of the article proposes widespread reform to ensure access to the beaches for the public. The U.S. Virgin Islands Legislature should amend the current law to provide specific public beach access rights, grant authority to CZM to enforce those rights, compel CZM to ensure proactive enforcement for beach access, and establish penalties for violations of those rights. Additionally, the article suggests that access to the beaches can be secured through land and easement acquisitions. Beach parks, easements, and exactions are all ways of ensuring the preservation of beach access. Finally, a government-managed leasing program to preserve beach access could be implemented.

A. Amend the Current Law

“We in the Virgin Islands have been plagued with this beach access issue for some time now. It’s no secret that this needs to be looked at and revisited,” said V.I. Department of Planning and Natural Resources spokesman, Jamal Nielsen.¹³³ The legislature must amend the Open Shorelines Act. There needs to be an explicit right to reasonable beach access so that CZM can exercise its authority to enforce the rights of the people. The law should also enable the public to compel CZM to ensure proactive enforcement of beach access. Additionally, the V.I. Code must include penalties for violation of these laws.

1. Express Requirement of Access to Shoreline

The Open Shorelines Act specifically vested in the public the right to the shorelines of the U.S. Virgin Islands; however, there is no specific language vesting a right to access those shorelines.¹³⁴ One without the other is meaningless.¹³⁵ It seems obvious, therefore, that having a right and not being able to exercise that right ensures no right at all. Indeed, it triggers memories of the historical struggles of our civil rights heroines and heroes, which continue today, and the

132. *Id.* at 540.

133. Shea, *supra* note 106.

134. V.I. CODE ANN. tit. 12 §§ 401-403 (2012).

135. See *Matthews v. Bay Head Improvement Ass’n*, 471 A.2d 355, 365 (N.J. 1984).

never-ending battle between property rights and the public interest.¹³⁶ As the law is currently written, the right of access to the shoreline is implied. Yet, when a conflict arises between a private landowner and the public, such as in the Judith's Fancy example,¹³⁷ the public is left with little recourse and the government officials can only intervene to prevent physical confrontation. CZM, the agency vested with the authority to ensure the public's right to utilize the shorelines,¹³⁸ claims that, because there is no specific right to access public trust land enumerated in the legislation, they cannot carry out their purpose of enforcing the public's right to the shorelines.¹³⁹ The result is, in effect, a violation of the Open Shorelines Act. This has led to a standstill in the enforcement of public beach access.¹⁴⁰ To correct this oversight, and to ensure that CZM exercises its authority to enforce the Act, the language of the legislation needs more specificity.

The federal government recognized the importance of the states' exercising "their full authority over the lands and waters in the coastal zone" by statute.¹⁴¹ In Florida, the legislature has enacted specific legislation with the purpose of ensuring the public's right to reasonable access to beaches.¹⁴² The legislature found that conserving land was an important part of the economy and ecology of the state.¹⁴³ The legislature further determined "that rapid increases in population and development threatened the integrity of the environment and limited opportunities for citizens and visitors to enjoy the state's natural areas."¹⁴⁴ An interest thus developed to establish an agency that would assist in resolving land use conflicts.¹⁴⁵ As a result, within the Department of Environmental Protection, the Florida Legislature created the Florida Communities Trust.¹⁴⁶ This agency was specifically given all powers necessary or convenient to carry out the purposes and provisions including undertaking, coordinating, or funding activities and projects, including those of public access.¹⁴⁷ The Florida Communities

136. See generally *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. 420 (1837); DAVID J. BODENHAMER, *OUR RIGHTS* 221-22 (2007).

137. See generally Stokes, *supra* note 118.

138. V.I. CODE ANN. tit. 12 § 903 (2012).

139. See Stokes, *supra* note 118.

140. See *id.*

141. 16 U.S.C. § 1451(i) (2012).

142. FLA. STAT. ANN. § 187.201(8)(b)(2) (2008).

143. § 380.502(1).

144. *Id.*

145. *Id.*

146. § 380.504(1).

147. § 380.507.

Trust was also given specific authority to make rules necessary to carry out its purpose and to exercise any power granted to it by law.¹⁴⁸

The V.I. Legislature has already acknowledged the “uncontrolled and uncoordinated development of the shorelines and attempts to curtail the use of the shorelines by the public.”¹⁴⁹ As a result, the V.I. Legislature determined that it needed to preserve tradition as well as protect what became a right of the public.¹⁵⁰ Thus, within the V.I. Department of Planning and Natural Resources, a CZM Commission was created to achieve that goal.¹⁵¹

In the effort of the U.S. Virgin Islands to balance the right of private property owners and the public’s right to access, the U.S. Virgin Islands’ Legislature should enact legislation to specifically obtain and maintain public access to the beaches for the benefit of the public, with full respect for the constitutional rights of landowners, through eminent domain, contract, easements, and other compensating means of ingress and egress. This proposed amendment should strengthen the law and make it clear to CZM, private entities, and to the public at large that the Code does, in fact, vest in the people a specific right of access to the shorelines of the U.S. Virgin Islands so that CZM can accomplish its mission.

2. Enable Coastal Zone Management to Ensure Proactive Enforcement

The CZM should also take a more proactive approach so as to result in prevention of violations of the Act. The foregoing amendment clarifies the agency’s specific legislative authority to enforce the Open Shorelines Act. Such an amendment would place CZM in the ideal position to establish appropriate policies that are consistent with its objective to preserve public access and ensure equitable application of the public trust doctrine, while respecting the rights of all interested parties.

One of the issues that CZM faces in ensuring access to the public is the lack of access methods. Many existing access avenues are inadequate and underused because they are cumbersome to traverse to the sea.¹⁵² Overgrowth of plants and trees block access and no signs exist to direct the public to available adequate access routes to the

148. *Id.*

149. V.I. CODE ANN. tit. 12 § 903(a)(6) (2012).

150. *Id.*

151. § 904.

152. Willocks Interview, *supra* note 2.

sea.¹⁵³ There are also instances of deliberate obstruction by private entities to block access, as shown by the Easter campers¹⁵⁴ and Judith Fancy¹⁵⁵ examples previously mentioned. In fact, access ways are not available at all in many instances.¹⁵⁶ Finding exactly where a public beach access point is located can be a difficult challenge for those who want to spend time at the beach.¹⁵⁷ If people cannot find their way to the beaches, there can be no reasonable access to those beaches.¹⁵⁸

After reviewing beach access provisions from various jurisdictions, it appears that several mechanisms can be successfully implemented in the U.S. Virgin Islands to ensure beach access and should be promulgated in the rules and regulations of CZM. Coastal Zone Management should: (1) implement a public access education program;¹⁵⁹ (2) provide accessible offices to address complaints and compliments;¹⁶⁰ (3) determine, implement, and enforce right-of-way passages to the shore line;¹⁶¹ (4) develop and activate investigation teams to enforce compliance with the Open Shorelines Act; (5) establish a public access web page and other social media outlets to publicize its website and cause;¹⁶² (6) develop and publish maps highlighting public access metes and bounds to the shorelines throughout the V.I.;¹⁶³ (7) coordinate joint operations with other appropriate agencies to protect the people's rights and access to the shoreline; (8) recommend legislation to obtain legal enforcement authority which may not be obtained administratively; and (9) seek annual special appropriations through departments budgetary process to fund its enforcement activities. Each of these suggestions will strengthen and facilitate CZM because these are all steps that, when done conjunctively and proac-

153. *Id.*

154. Shea, *supra* note 106.

155. Stokes, *supra* note 118.

156. Willocks Interview, *supra* note 2.

157. Hodge, *supra* note 23.

158. *Id.*

159. See *Welcome to the California Coastal Commission Public Education Program*, CAL. COASTAL COMM'N, <http://www.coastal.ca.gov/publiced/pendx.html> (last visited June 20, 2015).

160. See *Municipal Public Access Plans Frequently Asked Questions*, STATE OF N.J. DEP'T OF ENVTL. PROT. PUB. ACCESS, <http://www.state.nj.us/dep/cmp/access/faqs.html> (last visited June 20, 2015).

161. Sullivan, *supra* note 105, at 351.

162. *Administrative Instruction Manual*, CITY OF MANHATTAN BEACH CAL. (Sept. 17, 2013), <http://www.ci.manhattan-beach.ca.us/home/showdocument?id=12461>.

163. See *Beach Access Points & Map*, PANAMA CITY BEACH, <http://www.visitpanamacitybeach.com/beaches/beach-access-points-and-map/> (last visited June 20, 2015). See also *Public Beach Parking & Access Locations*, THE TOWN OF EMERALD ISLE, N.C., <http://www.emeraldisle-nc.org/publicbeachaccessmaps.htm> (last visited June 20, 2015).

tively, will help alleviate the present conflicts the agency faces in preserving public beach access rights.

3. Establish Specific Penalties for Violation

Presently, Title Twelve, Chapter Ten of the V.I. Code concerning the Open Shorelines Act includes three sections, none of which delineate any consequences or penalties for violating the law.¹⁶⁴ Even Chapter Ten's prohibition against obstruction of the shorelines does not declare violations of that section to be crimes to which the general penalty section of the V.I. Criminal Code could be applied.¹⁶⁵ The lack of any express penalty for violation of the Open Shorelines Act lends a hand to its present inadequate enforcement. The following amendments should be implemented into the current Chapter Twenty-One penalty section, as well as establishing a specific penalty section for Chapter Ten, in order to ensure adequate consequences, which will in turn deter potential violators.

Imagine a law on the books that had no consequence for its violation. People would have no reason, other than perhaps one of morality, to abide by the law. This is not at all to suggest that penalties thwart wrongdoers unequivocally;¹⁶⁶ however, penalties certainly provide added deterrence. Provisions issuing penalties should be added to the Open Shorelines Chapter itself, similar to the penalty provision provided in Chapter Twenty-One of the V.I. Code dealing with CZM, which states:

Pain and pleasure are the great springs of human action. When [people] perceive[] . . . pain [or displeasure] to be the consequence of an act [they often withdraw from committing that act]. If the [] magnitude . . . of [the] pain [exceeds] the . . . value of the pleasure or good [expected] to be the consequence of the act, [man] will be absolutely prevented from performing it.¹⁶⁷

Deterrence¹⁶⁸ is the idea that, through fear of punishment, crime can be avoided or limited.¹⁶⁹ Research on the subject indicates that "there is a significant correlation between preventive strategies and the re-

164. V.I. CODE ANN. tit. 12 §§ 401-03 (2012).

165. § 3.

166. See Robert Keel, *Rational Choice and Deterrence Theory: Sociology of Deviant Behavior*, UNIV. OF MO. SAINT LOUIS, <http://www.umsl.edu/~keelr/200/ratchoc.html> (last updated July 14, 2005).

167. KATE E. BLOCH & KEVIN C. McMUNIGAL, *CRIMINAL LAW: A CONTEMPORARY APPROACH* 44 (Erwin Chemerinsky et al. eds., 2005).

168. "Deterrence" derives from the Latin verb meaning to frighten or terrify. *Id.* at 31.

169. *Id.*

duction or deflection of deviant activities.”¹⁷⁰ Although not the only reason for these activities, people generally will engage in deviant behavior if they have no fear of apprehension and punishment.¹⁷¹ Norms, laws, and enforcement are designed to “maintain the image that ‘negative’ behaviors will receive attention and punishment,” so as to reduce the probability of deviance.¹⁷² “Drunk-driving crackdowns, task forces for gang-related crimes, and highly visible notices of laws and policies are all examples of this concept.”¹⁷³

Because of the lack of a penalty section in Title Twelve, Chapter Ten, of the V.I. Code concerning the Open Shorelines, private entities are able to violate the law and CZM has no authority to penalize them.¹⁷⁴ Title Twelve, Chapter Twenty-One, dealing with CZM, however, consists of a general penalties section that only applies to the provisions of that specific chapter.¹⁷⁵ Language from this general penalties section should be used as an example to draft a penalties section for the Open Shorelines Act in Chapter Ten. At the same time, the current penalty section of Chapter Twelve pertaining to CZM should be enhanced so as to create a more strengthened body of law to maintain the public’s right of beach access.

Chapter Twenty-One’s penalty section has a civil fine for violation of that chapter not to exceed ten thousand dollars.¹⁷⁶ This type of fine should be added to Chapter Ten; however, the fine amount should be increased to a sum with a maximum limit, subject to the discretion of the administrator to ensure that the punishment fits the crime.¹⁷⁷

The purpose of punitive damages is to serve as a punishment as well as a deterrent.¹⁷⁸ For punitive purposes, evidence of the offender’s wealth can be considered to determine the total damage award.¹⁷⁹ Each individual violator’s penalty will therefore differ, depending on what amount would create the greatest deterrent.¹⁸⁰ Otherwise, it is very likely that such small fines may not deter multi-million dollar en-

170. Keel, *supra* note 166.

171. *Id.*

172. *Id.*

173. *Id.*

174. See V.I. CODE ANN. tit. 12 §§ 401-03 (2012).

175. § 913(c).

176. *Id.*

177. 33 U.S.C.A. § 1319 (2012).

178. DAN B. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 600 (Louis H. Higgins ed., 2009).

179. *Id.*

180. See *id.*

tities such as hotels and large residential corporations, which to them would be quite nominal.¹⁸¹

Chapter Twenty-One deems any violation of the Chapter a misdemeanor and any conviction punishable by imprisonment for no more than one year.¹⁸² The law does not speak of any difference in penalty for repeat offenders.¹⁸³ This does not lend a hand in achieving effective deterrence and compliance with the law. Repeat offenders must be subject to a harsher penalty than those with first time violations, and this is evidenced in other parts of U.S. Virgin Islands' law.¹⁸⁴ For example, Title Fourteen of the V.I. Code, which embodies the Criminal Code, provides for more aggressive penalties for habitual offenders.¹⁸⁵

B. Land Use Mechanisms

In addition to the foregoing proposals for reform, other means could be utilized with respect to enforcing beach access rights. By implementing various forms of these other options, the V.I. Government can avoid conflicts with private property owners while simultaneously preserving the people's right of access. "Beach parks" via gift of purchase or land, "historical usage easements," "exactions," and "government-controlled leasing," are land use mechanisms that can be used to fulfill this goal. When appropriately applied and enforced, these proposals could reconcile all of the competing interests and would leave no doubt as to the rights of the people to upland access for ingress and egress to the beaches and shorelines, to enjoy their beach access rights.

1. Creation of Beach Parks

"A park integrates the entire beach environment (tidelands, dry sand, and uplands) into a single recreational unit," so that "[t]he natural beauty . . . can be preserved intact."¹⁸⁶ It would benefit the public as a whole to have the beaches turned into parks and then have the government maintain those lands as beach parks. Establishing a beach park creates an obligation on the relevant management entity to maintain it. As a result, the beach could have amenities like water-based recreational activities, restroom and shower facilities, lifeguards, ven-

181. *See id.* at 602.

182. V.I. CODE ANN. tit. 12 § 913 (2012).

183. *Id.*

184. §§ 61-62.

185. § 61.

186. McKeon, *supra* note 5, at 566.

dors, parking, and more. Beach parks create a greater sense of security for both tourists and the public and are not burdened by access conflicts involving private entities.

This idea has already taken shape in the U.S. Virgin Islands with Magens Bay Beach as a successful example.¹⁸⁷ On December 28, 1946, Magens Bay Beach¹⁸⁸ was acquired by deed of gift from the owner, Arthur S. Fairchild.¹⁸⁹ This beach is over 500 yards long and is regarded as one of the most magnificent by world travelers.¹⁹⁰ The area was developed by the Magens Bay Authority¹⁹¹ for “[p]ublic recreation in accordance with the wishes of the public-spirited donor through whose generosity and vision the community has so largely benefitted.”¹⁹² A nominal fee is charged for entry to the beach in order to defray the cost of maintenance, security, restrooms, concessions, etc.¹⁹³ Following the success of Magens Bay Beach, in late 2006, the V.I. Government purchased 21 acres of Lindqvist Beach for 8.9 million dollars with the goal of creating another successful park under management of the Magens Bay Authority.¹⁹⁴

There are several other beaches in the U.S. Virgin Islands that have the potential to be turned into beach parks.¹⁹⁵ Looking at the success of the Magens Bay Beach Park, the government, when faced with beach access conflicts, should consider creating beach parks as an alternative. The Magens Bay Beach, although a gift, is a prime example of how the creation of beach parks preserves beach access to the public. Donation does not have to be the only way of acquiring the lands necessary for the creation of beach parks. Acquisition of beaches can also be achieved through purchase. Although it might be the costliest option, to the extent that the government is determined to preserve access in posterity for the public, investments must be made in order to produce desired results.

187. MAGENS BAY AUTH., <http://www.magensbayauthority.com/history.html> (last visited June 20, 2015).

188. An adjoining fifty acres of grove and grassland were acquired as well. *Id.*

189. *Id.*

190. *Id.*

191. “For the purpose of acquiring, improving and operating parks and beaches, the Magens Bay Authority [was] declared to constitute a corporate instrumentality of the Government of the United States Virgin Islands.” V.I. CODE ANN. tit. 32 § 51 (2012).

192. MAGENS BAY AUTH., *supra* note 187.

193. Hodge, *supra* note 23.

194. *Lindquist Beach & Smith Bay Park*, V.I. NOW (Jan. 23, 2013), <http://www.vinow.com/blog/lindquist-beach-smith-bay-park-110/>.

195. WILLOCKS, GEOGRAPHY, *supra* note 1, at 22-24.

Very little has been done since the acquisition of Magens Bay Beach in terms of expanding the idea of creating beach parks. Since 1946, the only other attempt at creating a beach park was in 2006, with the Lindqvist Beach.¹⁹⁶ There are no public beach access issues at the Magens Bay Beach, which proves the success of such an acquisition and the need for its consideration on a more frequent basis. The government needs to consider this option more fully and frequently when struggling with preservation of public beach access.

2. Historical Usage Easements

Access does not require control of all proprietary rights in a parcel of land.¹⁹⁷ An easement is an interest in land owned by another person which grants a right to use or control such land for a specific limited purpose.¹⁹⁸ Acquiring such a right for the public to pass over private property along a defined route for ingress and egress can be sufficient to satisfy public beach access concerns.¹⁹⁹ With an easement, the right of use is acquired, but not fee simple title to the property.²⁰⁰ By avoiding the purchase of the title from the owner, the lessee acquires the easement at a much cheaper price and still acquires the much-needed access.²⁰¹ This is an option that is fairly compatible with private investments in adjoining uplands.²⁰² In addition to being a less costly option of providing access to natural recreational facilities for the public, easements also allow commercial developers, such as resorts, to build on the uplands without destroying the public's enjoyment of the beaches, as they remain accessible.²⁰³ Thus, having a right to the beach combined with the ability to exercise that right via an access easement preserves the public's enjoyment of its beaches.²⁰⁴

"Prescription," "Implied Dedication," and "Custom" are all "legal doctrines, which recognize that, under certain circumstances, rights in [private] land[s] may be obtained through use."²⁰⁵ The public

196. Willocks Interview, *supra* note 2.

197. WILLIAM W. DREYFOOS, PLANNING FOR BEACH ACCESS: A MANUAL FOR FLORIDA LOCAL GOVERNMENTS 12 (June 1979), available at <http://www.gpo.gov/fdsys/pkg/CZIC-kf5627-b762-1979/html/CZIC-kf5627-b762-1979.htm>.

198. *Easement*, BLACK'S LAW DICTIONARY (4th ed. 2011).

199. DREYFOOS, *supra* note 197.

200. McKeon, *supra* note 5, at 567; see also BLACK'S LAW DICTIONARY 257 (4th ed. 2011).

201. McKeon, *supra* note 5, at 567.

202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.* at 572.

may acquire rights to access a beach simply by using a beach for a number of years.²⁰⁶ In order to be confirmed rights, however, lawsuits would have to be brought on behalf of the public.²⁰⁷ The U.S. Virgin Islands applies such doctrines when trying to preserve the public's right of access to the beaches.²⁰⁸

An easement by prescription may be established after proving uninterrupted and adverse²⁰⁹ use of property for a specific number of years.²¹⁰ An easement by dedication is established through a gift from a private owner of real property to the public.²¹¹ It requires an offer²¹² by the owner,²¹³ through an unequivocal act showing intent to dedicate, and acceptance by the public.²¹⁴ To establish an easement by custom,²¹⁵ the public's use must be "[immemorial], exercised without interruption, peaceable and free from dispute, reasonable, certain, obligatory, and consistent with other customs or other law."²¹⁶ Under these theories, however, access ways are only legally public after successful litigation.²¹⁷ While many access ways may be legally obtainable for public use, most of such routes have not been legally established.²¹⁸

206. *Id.*

207. *Id.*

208. See, e.g., *Red Hook Marina Corp. v. Antilles Yachting Corp.*, 9 V.I. 236 (D.V.I. 1971); *St. Thomas Beach Resorts, Inc.*, 11 V.I. at 79 (holding that the Open Shorelines Act merely codified the "firmly, well-settled, long-standing custom" that dates back to the period when the islands were under Danish rule, and before their purchase by the United States in 1917). The V.I. court used both the "Customs" and the "Implied Dedication" easements to vindicate the public's right of access to the beaches. *Id.*

209. "To prove adverse use, the claimant must [] establish that his or her use of the private property was open, notorious, and visible, and against the owner's will." Erika Kranz, *Sand for the People: The Continuing Controversy over Public Access to Florida's Beaches*, 83-JUN FLA. B.J. 10, 16 (2009).

210. *Id.*

211. JOSEPH W. SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 64 (Vicki Been et al. eds., 2010). "The public normally takes only an easement by implied dedication, with the owner retaining the underlying fee." McKeon, *supra* note 5, at 564.

212. "Longstanding acquiescence in use of beachfront property by the public is interpreted as an offer by the owner and acceptance by the public, creating an implied dedication. Once the implicit offer has been accepted, the owner cannot revoke his dedication." SINGER, *supra* note 211.

213. "Previous owners may [] be[] responsible for [a] dedication if they have the requisite intent to dedicate to the public." Sullivan, *supra* note 105, at 336.

214. SINGER, *supra* note 211.

215. "The doctrine of custom grew out of the feeling that a usage which had lasted for centuries must surely have been founded upon a legal right conferred at some time in the past." McKeon, *supra* note 5, at 582. When this right has been established, private property owners may not interfere with continued enjoyment of that right. *Id.*

216. Kranz, *supra* note 209, at 19.

217. *Id.* at 16.

218. See generally DREYFOOS, *supra* note 197.

In the interim, this may leave the public with a feeling of inadequate delivery of the right to access. Following rules of law and the judicial process take time, but can lead to perpetual rights of access and are just additional steps in resolving legal conflicts.

In *U.S. v. St. Thomas Beach Resorts, Inc.*, the V.I. District Court used the doctrine of custom as the justification for upholding the public's right of unobstructed use of the shoreline.²¹⁹ Simultaneously, this court noted its acceptance of both dedication and prescription as legal remedies under V.I. law.²²⁰ The court acknowledged that, even if custom was inapplicable, the rights of the public could have been upheld through a prescriptive easement appurtenant to the beach for recreational purposes.²²¹ Likewise, the court made clear that the conduct of the former owner of the resort uplands, "in acquiescing in the public use of the [land] and not attempting to prevent or limit such use," would have resulted in an implied dedication to the public.²²²

Although all of these legal remedies are available and have been used in the past, they are not being used as often or as fully as they should because beach access problems still exist. It should be public policy that on a regular basis, these legal remedies are available to actively pursue different claims. It should not wait until the public is denied access and suffers injury. The V.I. government should be proactive, through CZM and other administrative agencies like the Economic Development Commission (EDC)²²³ and the Attorney General's Office, in seeking out and acquiring access through easements that are legally established and enforced. The public should not have to resort to the time and expense of litigation, as such a burden should rightfully fall on the government of the U.S. Virgin Islands. Through annual budget appropriations, as well as through other private, local, and federal grants, CZM should acquire the necessary funding to preserve public beach access rights.

219. *St. Thomas Beach Resorts, Inc.*, 11 V.I. at 79.

220. *See id.* at n.4.

221. *Id.*

222. *Id.*

223. The Economic Development Commission was created in part so that "industrial development benefits [c]ould be made available for development and expansion of such industrial or business activities determined . . . to be in the public interest by advancing the growth . . . of the economy of the . . . Virgin Islands." V.I. CODE ANN. tit. 29 § 701 (2012).

3. Exactions

Exactions are contributions or concessions that landowners are required to give before the government will allow land development.²²⁴ It is very often private development, specifically resorts and large residential entities, that impair public beach access in the U.S. Virgin Islands. Developments “may cut off existing access to the beaches . . . [and] new development[s] will raise land values and create a pattern of land use that will make it more difficult and expensive to purchase beach easements in the future.”²²⁵ Coastal lands should therefore be developed in a manner that not only increases their value, but also allows public recreational use.²²⁶

In exercising this option, the V.I. Government authorized the Economic Development Commission²²⁷ to obtain public access to the beach and shoreline, by way of contract with applicants for tax exemptions and subsidies.²²⁸ This is an exemplary instance of how to proactively secure perpetual access to the beach and shoreline. Under this provision, an applicant for tax incentive benefits under the EDC must agree to fulfill various requirements as a condition of receiving benefits from the program.²²⁹ If the beneficiary does not remain in compliance with the contract, the beneficiary can suffer revocation or suspension of its benefits, assessment of fines, or both.²³⁰

Although this is a great proactive program, it does not apply to businesses that are non-beneficiaries.²³¹ There are still instances of ob-

224. Jennifer Evans-Cowley, *Development Exactions: Process and Planning Issues* 1 (Lincoln Institute of Land Policy, Working Paper No. WP06JEC1, 2006), available at <https://www.lincolninst.edu/subcenters/teaching-fiscal-dimensions-of-planning/materials/evans-cowley-planning.pdf>.

225. McKeon, *supra* note 5, at 571.

226. *Id.* at 572.

227. This Commission’s name is constantly in flux, having been changed to the “Industrial Development Commission,” and is presently pending another change in name to “Economic Development Program,” by Bill No. 30-0300, which is currently pending before the Committee on Economic Development, Agriculture, and Planning of the Thirtieth Legislature of the U.S. Virgin Islands. Hodge, *supra* note 23.

228. “For any applicant who proposes to do business on land adjoining any beach or shoreline of the Virgin Islands, agree to grant to the Government of the Virgin Islands a perpetual easement upon and across such land to the beach or shoreline to provide free and unrestricted access thereto to the public . . . upon the granting of a certificate of a certificate of industrial development benefits. This provision shall not be construed as requiring free use of public facilities, but only as requiring free access to the beach or shoreline to the general public as a condition precedent to the granting of industrial development benefits.” V.I. CODE ANN. tit. 29 § 708(i) (2012).

229. *Id.*

230. § 722.

231. *See generally* § 701.

struction of public beach access by private entities along the shoreline, as evidenced from the examples mentioned earlier. The legislature must mirror the example from the EDC section of the V.I. Code, but should expand this idea to condition all building permits in the coastal zone on whether a developer agrees to grant easements and thereby preserve public access.²³² If building plans do not meet the standards required, the commission will have the authority to reject the plans altogether.²³³ This would "provide[] a power of control over the [developer] that can easily be applied to secure a public easement through any planned [development] which threatens to block upland access to the beaches."²³⁴

The EDC Provision should mandate the coordination of enforcement with other appropriate governmental agencies so as to bolster the collective effort to ensure public beach access. These agencies must be actively and jointly involved in the struggle to preserve public access to the shores. This is a collective effort that has to be addressed as such.

Access through exactions has several advantages. "It is inexpensive, [] easy to administer . . . [and] reaches areas about to undergo extensive development, where the potential for conflict in land use is high."²³⁵ Exactions do not require prior public use of the area, "and [they] force[] developers to pay costs that would otherwise be borne by the public."²³⁶ Although there are many advantages to such exactions, the fact that exactions only apply to land that is about to undergo immediate development makes this method only a partial measure to preserve public rights.²³⁷ However, it is still a necessary measure in the struggle to preserve public access. The lure of advancement through economic development investments may be strong; however, it can never come at the price of the right of the people. Our government must encourage private entities to be good corporate citizens so that both interested parties can thrive in the absence of unnecessary debate and litigation.

4. Government-Managed Leasing Program

A government-managed leasing program establishes a lessor/lessee arrangement with a private entity as the lessee of government-

232. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 825 (1987).

233. *McKeon*, *supra* note 5, at 568.

234. *Id.*

235. *Id.* at 571-72.

236. *Id.* at 572.

237. *Id.*

owned land.²³⁸ This is a program that would provide a compromise between competing entities.²³⁹ The government would be able to control and preserve beach access for the public on coastal lands to which it already holds title,²⁴⁰ while generating revenues to be kept in an interest-bearing “public trust” fund.²⁴¹ Simultaneously, the lessee would get reasonable control of choice government-owned beachfront property with the ability to develop and make a profit off of the land without having to purchase the land. This idea is a unique way to manage an important public resource as well as generate needed funds to preserve beach access.

The government should publicize requests for proposals. Upon receiving proposals, the government would ensure potential lessees’ eligibility to take part in the program. Applicants would have to produce records of solid credit history and income information to prove that the applicant could pay the lease fees.²⁴² Preferences would be given to applicants with the intent to use the land to ensure the greatest environmental conservation.²⁴³ A bidding process should also be applied. Upon meeting all application requirements, the highest bidder would become the lessee.²⁴⁴

All management responsibilities would be vested in an appropriate administrative agency. Benefits and restrictions would be conveyed within the lease. The beach is still a significant natural resource. As such, as a provision in the lease, a lessee would not be able to commit waste upon the uplands or the beach.²⁴⁵ The right of first refusal²⁴⁶ would have to vest in the government at the end of the term.²⁴⁷ Revenue generated throughout the term should make this a sustainable program to fund beach access preservation in general. The special “public trust” fund could also be utilized as a depository for

238. Joseph W. Radzievich, *Why Not Buy the Beach? An Examination of California’s Existing Beach Access Conflict and a Remedy* 28 (Apr. 30, 2007) (unpublished J.D. thesis, Florida Coastal School of Law) (on file with author).

239. *See generally id.*

240. After title to the lands of the Virgin Islands were conveyed to the U.S. by Denmark, the U.S., in turn, placed such land under the control of the Government of the Virgin Islands. 48 U.S.C. § 1405c (2015).

241. Radzievich, *supra* note 238, at 19.

242. Radzievich, *supra* note 238, at 20.

243. *Id.*

244. *Id.*

245. The law imposes an obligation on a tenant to return the premises “at the end of the term unimpaired by any negligence of the tenant.” SINGER, *supra* note 211, at 651.

246. “A potential buyer’s contractual right to meet the terms of a third party’s higher offer.” BLACK’S LAW DICTIONARY 659 (4th ed. 2011).

247. Radzievich, *supra* note 238, at 28.

other grants and to acquire more property from private land owners, as well as various other gifts or awards to continue preserving beach access in perpetuity.

By implementing the foregoing programs, the government would be taking steps to ensure that free beach access is broadly available to as many people as possible.²⁴⁸ It is the American way. U.S. history has frowned upon placing the “value and benefits of great natural beauty on the market to be bought by the highest bidder.”²⁴⁹ Instead, these resources should be timelessly preserved for the use and pleasure of the public.²⁵⁰ These programs effectuate that preservation, and at the same time, raise much needed revenue to fund public access and perpetuate the public enjoyment of its majesty.

CONCLUSION

The U.S. Virgin Islands’ struggle to preserve beach access is no isolated problem. Across the U.S., the body of law governing this issue is vast and varying among various jurisdictions. Private control of the uplands threatens public enjoyment of the beaches. Owners, through their resort staff and residential subdivision security, isolate beaches by denying public access across private uplands.²⁵¹ The public’s right in trust lands is rendered valueless, because restrictions on access make de facto private beaches.²⁵²

Through its various administrative agencies, local governments must ensure that public beach access is properly preserved in perpetuity. This is a serious problem for the U.S. Virgin Islands and immediate action is necessary. Tempers are flaring and those who are informed are becoming impatient, and those who do not know as much are still injured and seeking answers.

The law must be amended to strengthen and solidify the public’s right of beach access as well as penalize those who violate that right. The CZM needs to be given specific authority to initiate the enforcement of the laws and enhance their strategies to proactively preserve beach access. Aside from amending the law, acquisition of the uplands to prevent conflict between competing interests of the public and large private entities should be considered as an option. Creating

248. Robert Thompson, *Affordable Twenty-Four Hour Coastal Access*, 12 OCEAN & COASTAL L.J. 91, 116 (2006).

249. *Id.*

250. *Id.*

251. McKeon, *supra* note 5, at 566.

252. *Id.*

beach parks, acquiring easements, and applying other land-use regulations are all options that should also be explored to ensure effective preservation of beach access in the islands. Finally, government-managed leasing can prove to be an innovative and useful tool for protecting dual rights of access and use forever.

It is time to take back the beaches by providing rights of access to use those beaches. To do so, the laws must change; the enforcement agencies must be activated; and citizens must assert their public beach access rights.
